Public Prosecutor v Zulkifli bin Omar

HIGH COURT (KANGAR) — CRIMINAL APPEAL NOS 41-03 OF 1998 AND 41-04 OF 1998
VINCENT NG J
10 MARCH 1998

Criminal Procedure *— Sentence — Dangerous driving — Causing death by reckless or dangerous driving — Whether deterrent penalty called for — High degree of culpability amounting to a wilful and callous disregard for safety — Balance between interests of the community and the mitigating factors*

Road Traffic *— Dangerous driving — Causing death by reckless or dangerous driving — Test for reckless driving — Whether excessive speed sole decider of reckless driving — Prevailing circumstances at the material time of the accident — Risk created must be both obvious and serious — Road Transport Act 1987 s 41(1)*

Words and Phrases *— 'Driving dangerously' — Road Transport Act 1987 s 41(1)*

Words and Phrases *— 'Driving recklessly' — Road Transport Act 1987 s 41(1)*

On 19 October 1996, at about 12.30 pm, a group of 41 Rakan Muda members were travelling along the Kangar-Alor Setar trunk road from the direction of Alor Setar towards Kangar when at Km 6.6, a 14-wheeler 60-foot long semi-trailer low loader ('the trailer-lorry'), carrying a load of iron rods and driven by the defendant from the opposite direction, collided into them, killing five of them and injuring four others. The defendant was charged for an offence under s 41(1) of the Road Transport Act 1987 ('the Act') for 'causing death by reckless or dangerous driving'. On 9 February 1998, after several days' trial before the learned magistrate in Kangar, the defendant was convicted as per charged and sentenced to 30 days' imprisonment and a fine of RM7,000, in default six months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 12 months. The deputy public prosecutor appealed against the sentence.

Held, allowing the appeal against sentence:

(1) To be guilty of the offence of reckless driving, the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or had seen the risk and nevertheless decided to run it. It was not in every case where the defendant was in fact driving dangerously that he should be held to be driving recklessly, although in most cases the two would coincide (see p 71G–I); *R v Guilfoyle* [1973] 2 All ER 844 followed.

(2) In an offence under s 41(1) of the Act, excessive speed was not the sole decider of reckless driving but there must also be a finding of the manner and other aspects of the defendant's

driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of the accident, including the nature, condition, and size of the road, and the amount of traffic which was or might be expected on the road. The risk created by the manner in which the vehicle was driven must be both obvious and serious, and the court had to be satisfied that the essential or core ingredients of recklessness had been proved beyond reasonable doubt (see p 72D–E); *R v Lawrence* [1981] 1 All ER 974; [1982] AC 510 and *R v Reid* [1992] 3 All ER 673 followed.

(3) In this case, the court was completely satisfied the learned magistrate had correctly made a finding that the essential or 'core' ingredients of reckless driving had been established beyond reasonable doubt and that the defendant had been guilty of the more serious offence of reckless driving under s 41(1) of the Act. He had also found the aggravating and heinous features of the offence, which were of material consideration in sentencing (see p 73G–H).

(4) The learned magistrate had applied the correct burden of proof at the end of the prosecution's case as well as the defence case and had not misdirected himself on the law or the facts or erred in point of principle that had resulted in any injustice to the defendant. The defendant failed to demonstrate that the magistrate had taken into account any irrelevant considerations which affected the outcome of the trial or had not taken into account vital or crucial relevant considerations, or had asked himself the wrong question. The defendant's appeal therefore did not warrant appellate interference (see pp 73I and 74A).

(5) It was vital to maintain the dichotomy between the two categories of the offence under s 41(1) of the Act, considering that the nature of punishment to be imposed on a defendant would be wholly dependent upon the court making a finding, beyond reasonable doubt, as to which of the two categories of the offence had been committed. The legislative target for the imposition of heavy and deterrent penalties was necessarily and quite rightly directed at the second category of dangerous and reckless drivers, those who had shown a high degree of culpability and callous disregard for the safety of other road users (see p 74C–D); *R v Guilfoyle* [1973] 2 All ER 844 and *Goh Kheng Seong v PP* [1993] 1 MLJ 103 followed.

(6) In considering sentence for reckless driving, there should be sufficient culpability on the part of an accused to justify imprisonment (see p 75E). In this case the magistrate erred in not giving any or sufficient regard or consideration to the serious and aggravating features of the case as the result of the highly culpable recklessness of the defendant's management of the trailer-lorry. Thus the 30-day imprisonment was untenable for being grossly inadequate. In the public interest, where the facts warrant, the courts ought not hesitate to mete out robust deterrent custodial

sentences against reckless drivers. In the present case, the sentence must be commensurate with and closely reflect the high degree of culpability and recklessness on the part of the defendant, as aggravated by the magnitude of the carnage that he had caused by his rash act. Therefore, in addition to the RM7,000 fine imposed by the magistrate, the defendant should be sentenced to three years' imprisonment and be disqualified from holding or obtaining a driving licence for a period of four years (see pp 77H–I , 78B–C and 79B–C).

[Bahasa Malaysia summary

Pada 19 Oktober 1996, lebih kurang jam 12.30 tengahari, sekumpulan ahli Rakan Muda seramai 41 orang sedang dalam perjalanan melalui jalan utama Kangar-Alor Setar dari arah Alor Setar menghala ke Kangar apabila di Km 6.6, sebuah separa-treler pengangkutan rendah 14-roda sepanjang 60 kaki ('treler-lori tersebut'), yang membawa muatan batang besi dan dipandu oleh defendan dari arah yang bertentangan, telah berlanggar dengan mereka, yang menyebabkan lima kematian dan mencederakan empat orang. Defendan telah dituduh atas kesalahan di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta tersebut') kerana 'menyebabkan kematian dengan memandu secara melulu atau membahayakan'. Pada 9 Februari 1998, selepas perbicaraan selama beberapa hari di hadapan majistret di Kangar, defendan telah disabitkan sepertimana yang dituduh dan dihukum pemenjaraan selama 30 hari dan denda sebanyak RM7,000, jika ingkar pemenjaraan selama enam bulan. Beliau juga tidak dibenarkan memegang atau mendapatkan lesen memandu bagi tempoh selama 12 bulan. Timbalan pendakwa raya telah merayu terhadap hukuman tersebut.

Diputuskan, membenarkan rayuan terhadap hukuman:

(1) Untuk didapati bersalah atas kesalahan memandu dengan melulu, pemandu (defendan) pasti telah mewujudkan risiko kecederaan yang nyata dan serius kepada orang tersebut atau kerosakan kepada harta dan semestinya sama ada tidak memikirkan kemungkinan risiko yang ketara itu, atau telah nampak risiko namun begitu berkeputusan untuk terus berhadapan dengannya. Bukanlah dalam setiap kes di mana defendan adalah pada hakikatnya memandu dengan cara yang membahayakan bahawa ia seharusnya diputuskan sebagai memandu dengan cara yang melulu, walaupun dalam kebanyakan kes kedua-duanya akan berbetulan (lihat ms 71G–I); *R v Guilfoyle* [1973] 2 All ER 844 diikut.

(2) Dalam kesalahan di bawah s 41(1) Akta tersebut, kelajuan yang melampau bukannya pemutus tunggal memandu dengan cara yang melulu tetapi haruslah juga terdapat keputusan mengenai cara dan aspek-aspek lain berhubung dengan cara defendan memandu yang mana membentuk sifat melulu, dengan menimbangkan keadaan semasa pada waktu yang material akan

kemalangan tersebut, termasuk sifat, keadaan dan saiz jalan, dan bilangan kenderaan yang telah atau dijangkakan berada di jalan tersebut. Risiko yang diwujudkan oleh cara dalam mana kenderaan tersebut dipandu seharusnya ketara dan serius, dan mahkamah haruslah berpuas hati bahawa unsur-unsur penting atau teras sifat melulu telah dibuktikan melampaui keraguan munasabah (lihat ms 72D–E); *R v Lawrence* [1981] 1 All ER 974; [1982] AC 510 dan *R v Reid* [1992] 3 All ER 673 diikut.

(3) Dalam kes ini, mahkamah amat berpuas hati majistret yang arif telah dengan betulnya membuat keputusan bahawa unsur-unsur penting atau 'teras' memandu dengan cara melulu telah dibuktikan melampaui keraguan munasabah dan bahawa defendan bersalah atas kesalahan yang lebih serius, yakni memandu dengan cara yang melulu di bawah s 41(1) Akta tersebut. Beliau telah juga mendapati ciri-ciri kesalahan itu yang buruk dan keji, yang mana merupakan pertimbangan yang material dalam menjatuhkan hukuman (lihat ms 73G–H).

(4) Majistret yang arif telah memakai beban membukti yang betul di penutupan kes pendakwa dan juga kes pembelaan dan telah tidak tersalah arah akan dirinya sendiri berdasarkan undang-undang atau fakta-fakta atau terkhilaf di sisi prinsip yang telah mengakibatkan sebarang ketidakadilan kepada defendan. Defendan gagal untuk menunjukkan bahawa majistret telah mengambil kira sebarang pertimbangan yang tak relevan yang menjejaskan keputusan perbicaraan tersebut dan telah tidak mengambil kira pertimbangan penting atau yang secara relevan dianggap genting, atau pun telah menanyakan kepada diri sendiri persoalan yang salah. Rayuan defendan dengan itu tidak mewajarkan gangguan kuasa rayuan (lihat ms 73I dan 74A).

(5) Adalah penting untuk mengekalkan pembahagian antara kedua-dua kategori kesalahan tersebut di bawah s 41(1) Akta tersebut, memandangkan bahawa sifat hukuman yang akan dikenakan ke atas seseorang defendan akan secara keseluruhan bergantung pada mahkamah membuat keputusan, melampaui keraguan munasabah, mengenai yang mana satu dari kedua-dua kategori kesalahan tersebut telah dilakukan. Sasaran perundangan bagi pengenaan penalti-penalti yang berat dan bersifat menghalang telah dengan perlunya dan secara betulnya ditujukan kepada kategori kedua, iaitu pemandu-pemandu yang membahayakan dan yang memandu dengan cara yang melulu, mereka yang telah menunjukkan sifat tidak mempedulikan pada tahap yang tinggi akan kesalahan dan bersikap tidak mengenal belas kasihan akan keselamatan pengguna-pengguna jalan raya yang lain (lihat ms 74C–D); *R v Guilfoyle* [1973] 2 All ER 844 dan *Goh Kheng Seong v PP* [1993] 1 MLJ 103 diikut.

(6) Dalam mempertimbangkan hukuman untuk memandu dengan cara melulu, haruslah terdapat kesalahan yang secukupnya di pihak seseorang tertuduh bagi mewajarkan pemenjaraan (lihat

ms 75E). Dalam kes ini majistret telah terkhilaf dalam tidak memberikan apa-apa pertimbangan yang secukupnya kepada ciri-ciri serius dan meruncing kes tersebut akibat pengendalian treler-lori tersebut dengan cara melulu oleh defendan. Dengan itu, pemenjaraan selama 30 hari tidak dapat dipertahankan kerana amat tidak memadai. Demi kepentingan awam, di mana fakta-fakta mewajarkan, mahkamah-mahkamah tidak seharusnya ragu-ragu untuk menjatuhkan hukuman yang tegas, bersifat mencegah dan juga bersifat menjaga (custodial) terhadap pemandu-pemandu yang memandu dengan cara yang melulu. Dalam kes semasa, hukuman tersebut semestinya sepadan dengan dan menunjukkan kesalahan dan sifat melulu di tahap yang tinggi di pihak defendan, sepertimana yang tunjukkan pentingnya kematian beramai-ramai yang telah diakibatkan oleh perbuatannya yang gopoh ini. Dengan itu, sebagai tambahan kepada denda sebanyak RM7,000 yang dikenakan oleh majistret, defendan seharusnya dihukum penjara selama tiga tahun dan tidak layak memegang atau mendapat lesen memandu bagi tempoh selama empat tahun (lihat ms 77H–I , 78B–C dan 79B–C).]

Notes

For cases on sentence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2213–2674.

For cases on road traffic, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1–526.

Cases referred to

Goh Kheng Seong v PP [1993] 1 MLJ 103 (folld)
Lee Chow Meng v PP [1976] 1 MLJ 287 (refd)
Lim Kong v PP [1962] MLJ 195 (refd)
PP v Choo Teck Heng [1960] MLJ 218 (refd)
Pembangunan Maha Murni Sdn Bhd v Jurus Ladang Sdn Bhd [1986] 2 MLJ 30 (refd)
R v Chadwick [1991] RTR 176 (refd)
R v Boswell and other appeals [1984] 3 All ER 353 (refd)
R v Guilfoyle [1973] 2 All ER 844 (folld)
R v Lawrence [1981] 1 All ER 974; [1982] AC 510 (folld)
R v Mawson (1992) 13 Cr App R(S) 218 (refd)
R v Reid [1992] 3 All ER 673 (folld)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Tan Thang Sang v PP; Choong Sze Foong v PP [1975] 1 MLJ 204 (refd)
Yong Pak Yong v PP [1959] MLJ 176 (refd)

Legislation referred to

Commercial Vehicles Licensing Board Act 1987 s 20(1)(a), (2)
Road Transport Act 1987 ss 41(1), (4), 42, 43, 66(1)(n)

Appeal from: Kes Tangkap No 83–507–96 (Magistrates' Court, Kangar) A

Kamarulzaman Abdul Jalil (*Abdul Razak Musa* with him) (Deputy Public Prosecutor) for the appellant.
Harminder Singh (*Harminder Singh & Co*) for the respondent. B

Vincent Ng J: On a fateful day on 19 October 1996 at about 12.30 pm a group of 41 Rakan Muda members were partaking in the veritable joys of 'club biking' — apparently one of the healthy passions of the young and adventurous — biking to nowhere in particular but everywhere in terms of feeling the wind, the laughter, the comradeship and the smart gear. They C were travelling along the Kangar-Alor Setar trunk road from the direction of Alor Setar towards Kangar; and tragically as it turned out, this joyous frolic came to grieve when at Km 6.6, a 14-wheeler 60-foot long semi-trailer low-loader ('the trailer-lorry') — bearing registration number KAM 621 (TK 1860), carrying a load of iron rods and driven by the D defendant from the opposite direction — collided into them, killing five of them and injuring four others in the ensuing aftermath.

The defendant was charged for an offence under s 41(1) of the Road Transport Act 1987 ('the Act'), which read as follows:

> Bahawa kamu pada 19 Oktober 1996 jam lebih kurang 12.30 tengah hari, E di Km 6.6, Jalan Kangar-Alor Setar, di dalam Daerah Kangar, di dalam Negeri Perlis, sebagai pemandu motor treler No KAM 621 (TK 1860) telah memandu kenderaan tersebut di atas jalan raya dalam keadaan melulu atau dengan cara merbahaya setelah mengambil kira tentang segala hal keadaan jalan (termasuk jenis, keadaan dan ukuran jalan tersebut) sehingga menyebabkan kematian ke atas penunggang motosikal No PCE 261 Mohd F Azhar bin Abu Bakar; (2) PDF 6009 Hafiz bin Yusof; (3) PDD 4097 Raksut a/l Vichit; (4) PDF 7961 Mohd Hazlan bin Awang Kechik; dan (5) PDF 8091 Ahmad Fitri bin Daud. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 41(1) Akta Pengangkutan Jalan 1987.

G

On 9 February 1998, after several days' trial before the learned magistrate in Kangar, the respondent Zulkifli bin Omar ('the defendant') was convicted as per charged and sentenced to 30 days' imprisonment and a fine of RM7,000 — in default six months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 12 months.

The deputy public prosecutor appealed against sentence and at the H eleventh hour, after vacillating for several days, the defendant also filed a cross-appeal against sentence and conviction.

Considering the alarming rise in traffic accidents and road deaths as the result of callously reckless or dangerous driving, no doubt contributed to by the phenomenal increase in vehicular traffic and change in driver I attitude, it is of general public importance that I should discuss and endeavour to define and to lay down certain guidelines pertaining to the charge of 'causing death by reckless or dangerous driving' under s 41(1) of the Act.

Section 41(1) of the Act reads:

> Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

The dictum of Lawton LJ in the English Court of Appeal decision in the celebrated case of *R v Guilfoyle* [1973] 2 All ER 844 — which concerned a lorry driver who was convicted of causing death by dangerous driving — is illuminating. He had this to say (at p 845):

> Cases of this kind [causing death by dangerous or reckless driving] fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment [hereafter called 'the first category'], and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness [hereafter called 'the second category'].

This distinctive categorization of dangerous driving was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v PP; Choong Sze Foong v PP* [1975] 1 MLJ 204. See also *R v Boswell and other appeals* [1984] 3 All ER 353 (CA). And more recently, in 1993 this categorization was also adopted in my decision in *Goh Kheng Seong v PP* [1993] 1 MLJ 103.

It is precisely in recognition of this distinction between the two categories of offences under s 41(1) for 'causing death by reckless *or* dangerous driving' that the Legislature has, in all its wisdom, made express provision under s 41(4) that:

> The court may upon the trial of a person for an offence under this section [s 41(1)] convict such person of an offence under section 42 [dangerous and reckless driving but without causing death] or section 43 [driving without due care and attention or without reasonable consideration].

As Parliament has not spelt out the meaning of 'driving dangerously' or 'driving recklessly' it is left to the courts to do so. To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.

It is not in every case where the defendant is in fact driving dangerously that he should be held to be driving recklessly, although in most cases the two will coincide. The definition of the words 'driving recklessly' in Lord Diplock's speech in *R v Lawrence* [1981] 1 All ER 974 at p 982; [1982] AC 510 at pp 526–527 was cited and extensively discussed with approval by the five Law Lords in the recent English House of Lords decision in *R v Reid* [1992] 3 All ER 673, albeit, redefined and recrafted in less controversial but more focused language, by Lord Goff of Chieveley— a

member of the board — which I think it useful that I should set out here (at p 693): A

> On this approach, enlivened by examples, it is, I believe, relatively easy to understand Lord Diplock's encapsulation of the law in his specimen direction, which is to the effect that a jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing physical injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognized that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious. B C

See also *R v Boswell and other appeals.*

In an offence under s 41(1), excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt. D E

On conviction

It is pertinent to note that with the speed limit of '70/80 ksj' imposed and paint-marked on all heavy vehicles (by gazetting by the Minister charged with the responsibility for transport under s 66(1)(n) of the Act), there is indelible indication that even the Legislature itself intends that heavy goods vehicles — such as the 14-wheeler trailer driven by the defendant — be treated in a class of its own, thus prescribing less speed and more caution, in contradistinction with light vehicles. The obvious reason for this implied legislative caveat is that the consequences of such a vehicle being driven recklessly would be far more serious than where an ordinary motor vehicle is driven recklessly. Such vehicles with such speed limitations are thus prohibited from being driven in excess of 80 km/h even on a German Autobahn at 2am, so to say. It would thus follow that should drivers of heavy goods vehicles be found to be reckless in the second category offence as defined above, especially in the absence of any contributory negligence on the part of the road victim, the courts ought to impose deterrent custodial sentence on them — which may extend to five years under s 41(1) of the Act. F G H

Reverting to the present case, the central fact that was established beyond doubt from the available evidence was that, the trailer-lorry driven by the defendant was in the dire process of overtaking a motor van, at a speed reckoned excessive for its size and weight, when it collided, tore and rammed into the convoy of motor cyclists, then travelling from the opposite direction in a single file. A significant fact that was asserted by no fewer I

than three prosecution eyewitnesses — PW3 (prosecution witness) and corroborated by PW4 and PW7 — and unshaken in close cross-examination by counsel was that the defendant had made two attempts to overtake a van without engaging his signal-lights indicator. And it was only while in the process of overtaking with a full load of steel bars, on his second attempt, that the collision happened. Further, PW4 had also testified that he (PW4) was following the trailer-lorry in his car at a speed of 70–80km/h, and the trailer-lorry was in turn following a van, all in the same direction. Hence, as the van would then have also been clocking a speed of between 70–80km/h, in order to overtake the van, the defendant must have increased his speed to over 80km/h. Indeed, the mute evidence showed that the vehicle's tyres made two long brake marks, both 9.4m in length and, post-collision, it rested on the other side (the wrong side) of the road on the grass road-table, all of which indicated that the defendant was speeding. Also, it is common ground that the trailer-lorry veered across to the other side of the road pre-collision and not post-collision.

The sole thrust of the defendant's case was that the driver of the van in front had suddenly applied its brakes, which led him to do the same. But, his 60-foot long trailer-lorry could not stop, and because there was a motorcycle on his left, he had to swerve towards his right, thereby colliding with the motorcycle convoy travelling from the opposite direction. His story deserves no credence and is untenable as: none of the three prosecution eyewitness had seen the phantom motorcycle mentioned by the defendant; the sketch plan taken at the scene of accident disclosed no trace of any tyre brake-mark on the road that could have been caused by the van; and exh P7A, a report by Puspakom from an inspection of the trailer-lorry conducted soon after the accident, confirmed that all its 14 tyres, the hand brake, and the foot brake were in satisfactory condition. The state of mechanical and general maintenance of a vehicle is also of material consideration when deciding whether the first or the second category offence under s 41(1) has been committed.

Thus, after having carefully studied the oral testimony of all the witnesses in conjunction with the documentary and mute evidence tendered at the trial, this court is completely satisfied that the learned magistrate had correctly made a finding that the essential or 'core' ingredients of reckless driving had been established beyond reasonable doubt — indeed, in my view, beyond a shadow of a doubt — and that the defendant had been guilty of the more serious (second category) offence under s 41(1) of the Act. He had also found the aggravating and heinous features of the offence, which are of material consideration in sentencing.

This court further holds that the learned magistrate had applied the correct burden of proof at the end of the prosecution as well as the defence case and had not misdirected himself on the law or the facts or erred in point of principle, that has resulted in any injustice to the defendant. Further, looking at the matter as a whole, I would hold that the defendant has failed, before me, to demonstrate that the magistrate had taken into account any irrelevant considerations which affected the outcome of the trial, or had not taken into account vital or crucial relevant considerations, or had asked himself the wrong question. The defendant's appeal therefore

does not warrant appellate interference. However, the above dissertation that pertains to the conviction of the defendant became largely moot or academic, when, during the hearing yesterday morning, he did another of his flip-flop, by withdrawing his appeal against conviction and sentence under Criminal Appeal Case No 41–04–98. But, as I feel that a dissertation on the conviction may yet serve as a future guide for the lower courts, due to a dearth of such cases, I have decided nonetheless to undertake the same.

On sentence

It is vital to maintain the dichotomy between the two categories of the offence under s 41(1) of the Act, considering that the nature of punishment to be imposed on a defendant would be wholly dependent upon the court making a finding, beyond reasonable doubt, as to which of the two categories of the offence has been committed. We have to bear in mind that the legislative target for the imposition of heavy and deterrent penalties is necessarily and quite rightly directed at the second category dangerous and reckless drivers; those who have shown a high degree of culpability and callous disregard for the safety of other road users. It is illuminating to note that, pertaining to sentence, Lawton LJ in *R v Guilfoyle* [1973] 2 All ER 844 had also placed great emphasis on the need for the different treatment of traffic offenders, when he said (at p 845):

> Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users.
>
> In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two to four years, and if it is bad he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.

Further, in the same vein, and with his usual clarity of expression, Ong CJ (Malaya) in *Tan Thang Sang v PP; Choong Sze Foong v PP* [1975] 1 MLJ 204 had this to say (at p 208):

> All the above cases were, in my opinion, proper to cite, provided that these appellants had behaved as heinously as Downey (*R v Downey* [1954] MLJ 148) and the others. To thus equiparate the appellants with those people not only implied that these appellants deserved more condign punishment, but also a finding of 'dangerous driving' indistinguishable from the conduct of those other drivers. In none of the five cases were the relevant facts set out at all. Being classed together for punishment, in total disregard of the

A facts of each case, it necessarily follows that these appellants had also been denied due and proper consideration of their defences and the different circumstances under which they became involved in their misfortune.

In my view, such miscarriage of justice must be rectified. I do not think any motorist should be condemned to serve a long stretch in prison unless in the manner of his driving he had shown a culpable and callous disregard B for the safety of other road users. Making scapegoats of innocent motorists is anathema to our administration of justice.

And also, in *Goh Kheng Seong v PP* [1993] 1 MLJ 103, though I had postulated that (at pp 110–111):

C ... in the interests of the motoring public and other road users the courts should come down hard on certain motorists charged for dangerous driving, and where the facts warrant, impose custodial sentence which they may richly deserve on a conviction under s 34A(1) of the Ordinance [s 41 of the Act]

I had nevertheless also cautioned that (at p 111):

D ... a motorist should not be so severely sentenced unless the court is satisfied that the accused had shown beyond question, in the manner of his driving, a high degree of culpability amounting to a wilful and callous disregard for the safety of other road users or a selfish disregard for the safety of other road users or of his passengers as accords with the second E definition aforesaid of 'dangerous driving' in *R v Guilfoyle* [1973] 2 All ER 844. ... . In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different ken and may thus emerge from prison metamorphosed into a F personality, the worse for society.

Driving is part of life for nearly everybody and which, although capable of being done safely, is inherently dangerous. A motor vehicle is a lethal object, capable of inflicting death or serious injury at all times when it is in motion. Whether or not it does so is dependent upon the conduct of the G driver throughout the time he is driving. The duty to take care (ie to avoid risk) is part of the obligations of any driver. If he drives in a way that in fact involves an obvious and serious risk and gives no thought to the matter of risk or to the circumstances which make such risk apparent he is in gross breach of those duties.

It can never be the intention of the Legislature to have the courts H impose equipollent sentence for both the first as well the second category offence under s 41(1) of the Act, as otherwise, considering the current hazards of driving, it could be said that as soon as one sits behind the steering wheel to drive a vehicle, he assumes the stark potential risk of being either consigned to prison, for dangerous driving, or to the world I beyond, by a reckless driver. One may scream for the severest of punishments to be meted out against persons convicted under s 41(1) of the Act, without caring to make any distinction between the two categories of such offence. Should it be only when we or our children become involved in the misfortune of causing death through momentary inattention or misjudgment or momentary inadvertence while driving (which so many of us may,

I fear, be guilty of from time to time with the prospect of a long term imprisonment hanging over our heads) that the buck and the bark stops? A

Our system of justice enjoins the courts to mantain a judicious balance between public interest and the rights of a man in the dock charged for — nay, even convicted of — an offence, to a fair trial and to be heard in mitigation of his offence — surely, this is an integral part of our bedrock core system of just and justiciable laws, firmly and fairly enforced. Also, not forgetting for a moment, the principle of natural justice as encapsulated in the maxim audi alteram partem, the very sine qua non principle in the practice of a civil society, where the demonstrably civil citizens show the uncivil sections of society how to be civil. In its wake, this 30-day prison sentence, have attracted heavy public criticisms through the media, calling for sterner and more condite sentence against such drivers. In the heat of the outcry, some have even suggested that the courts should put aside mitigating factors when innocent lives are lost; in other words, to deny such accused persons the right to plead in mitigation. This would be anathema to our administration of justice, which we have every reason to be proud of; a society does not readily jettison what it treasures. B C D

It is only when a reasoning man assumes the judgment seat, having to earnestly consider also the ramifications and implications of a decision, that is his lot to make, that he soon discovers that things are not as facile as suggested. A worthy judge with an ingrained, inherent and innate desire to do justice, is never influenced by the prevailing mood or passions of the day. In any event he is too old — perhaps even weatherbeaten — too enured to be afflicted by strong genuine passions of any kind. No judge or magistrate could rest be assured that he is resting on rock-solid terra firma when it comes to sentencing, given that the material facts in, as well as opinion on, what is the appropriate sentence for a given offence vary from one case to another. The exercise of his discretion on the sentence to mete out, is often based on a tenuous balance between the vital interests of the community at large, and the mitigating factors of the crime and the criminal in particular, and upon certain sentencing principles, part of which is encapsulated pithily in the words of Hashim Yeop Sani J (as he then was), an illustrious jurist of his time, in *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270, in which his Lordship cautioned the courts, that: 'No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented'. E F G

In my opinion, for about 40 years past (ie since the 1958 Road Traffic Ordinance) there has been ample statutory sanctions against reckless drivers which could be employed to much greater effect, as the maximum custodial penalty (under the then s 34A) for dangerous or reckless driving has been, until hitherto, five years' imprisonment. So, it may come as a suprise to the layman that from the historical case-authorities cited by the learned deputy public prosecutor to the learned magistrate in the court below, the custodial sentence meted out by the courts in the past have ranged from one to six months. To be fair to our largely competent magistrates it must be observed that only in recent times have our citizenry to face the phenomenal upsurge in the number of callously reckless drivers, strange, reckless and aggressive antics of heavy vehicles drivers (some of H I

them — according to press reports — even high on morphine or heroin), daredevil road weavers on their 'iron horses', as well as road-rage thugs with proclivity to bring out their long swords or iron rods, rather than negotiate and exchange visiting cards (of course, road bullies do not carry visiting cards). It can thus be seen that it is unnecessary and unfair to direct too astringent a stricture at the learned magistrate, in Kangar on the 30-day custodial sentence that he had imposed.

It is not possible, it needs hardly to be said, to say in advance what the proper sentence should be in any particular case. However, the duty of the court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters.

There is thus the need for the lower courts to demonstrate a greater inclination to utilize the full range of the severity of sentence open to them by statute to impose. And, if more condign punishments could be meted out in appropriate cases, to fit the gravity of the offence, it would obviate the necessity for introducing the inflexible legislative minimum or mandatory sentence, which would remove the discretion of courts at the expense of justice in the long run. Be that as it may, the ensuing controversy over the learned magistrate's decision in this case has demonstrated that, on the sentencing of traffic offenders, the lower courts would have to move with the times or be mowed by a chorus of adverse public opinion. The sentences passed should articulate a response to the growing unease over the phenominal rise in such offences.

Hence, as, under the principle of 'judicial notice' (see *Pembangunan Maha Murni Sdn Bhd v Jurus Ladang Sdn Bhd* [1986] 2 MLJ 30; *Lee Chow Meng v PP* [1976] 1 MLJ 287; *Lim Kong v PP* [1962] MLJ 195; *Yong Pak Yong v PP* [1959] MLJ 176 and *PP v Choo Teck Heng* [1960] MLJ 218) judges are enjoined to import into their deliberations on questions they have to decide, their knowledge of common affairs of life, in the current appeal this court must not wear blinkers and fail to take into account the new realities on road use and behaviour in our country — all the more so as such realities are backed up by hard facts and figures. According to a report by the Economic and Social Commission of Asia Pacific (ESCAP), Malaysia has the third highest accident rate in the world and the highest accident fatalities in the world — indeed, for five consecutive years from 1992 to 1996 — with a fatality rate of 8.28 for every 10,000 cars on the road as compared to Finland's 1.80 for every 10,000 cars.

The only aspect of the case where the learned magistrate fell into error was the feeble and inordinately short-term custodial sentence that he had imposed. It would appear that he did not give any or sufficient regard or consideration to the serious and aggravating features of the case, where five precious lives have been lost as the result of the highly culpable recklessness in the defendant's management of the trailer-lorry. This could be readily gleaned from the record of appeal. Thus, the 30 days imprisonment is untenable for being grossly inadequate, and I would allow the Public Prosecutor's appeal against sentence.

Recently, there has been an increasing phenomenon of callous and culpably reckless heavy vehicle drivers on our roads. It is my view that the

cynical disregard for the safety of other road users by heavy vehicle drivers, often observed on our roads, may perhaps stem from the thought that they do not (normally) own the vehicles they drive, and that by virtue of the weight and size of their vehicles, the injuries they may sustain should they be involved in any awful road carnage would be far less severe than occupants of other lighter vehicles — often not so much as a broken toe or leg.

Consequently, in the public interest, where the facts warrant, the courts ought not hesitate to mete out robust deterrent custodial sentences against such drivers. And, in the present case, the sentence must be commensurate with and closely reflect the high degree of culpability and recklessness on the part of the defendant, as aggravated by the magnitude of the carnage that he had caused by his rash act.

On the point of aggravating factors, to govern the court's deliberation in sentencing, perhaps the English Court of Appeal decision in *R v Chadwick* [1991] RTR 176 is apropos to the case in hand. In that case, the appellant — who was 39 years of age and had been driving commercial vehicles for most of his working life — was driving an articulated motor vehicle carrying a four-ton load along a wet road. He was driving above the speed limit when he started to overtake another large vehicle near a bend in the road. A collision with two other vehicles travelling in the opposite direction caused the death of three people. On his conviction for reckless driving, the appellant was sentenced to 15 months' imprisonment and disqualified from driving for five years. On appeal against sentence, it was held that the offence was aggravated by the fact that the reckless driving concerned had caused the death of more than one person; the extent to which the offence was aggravated depended upon the particular facts of the case; it was obvious that where a heavy goods vehicle was driven recklessly the consequences would be more serious than where an ordinary motor vehicle was driven recklessly; and as the appellant was an experienced driver the sentence imposed upon him was justified. Accordingly, the appeal was dismissed (*R v Boswell* [1984] 3 All ER 353 applied).

(See also *R v Mawson* (1992) 13 Cr App R(S) 218 (CA)).

In deciding the appropriate measure of punishment to mete out in the current case, this court has to factor-in the following catalogue of pretty damning case features: (a) the defendant was driving a heavy semi-trailer low-loader vehicle, where greater care and caution is expected by the law; (b) a high degree of wilful culpability in a very bad piece of reckless driving by the defendant — and thus the gravity of the second category offence — has been established beyond peradventure; (c) this court must never lose sight of the fact that the defendant had, through his callous and reckless driving, snuffed out five precious lives and laid waste two others (who suffered multiple bone fractures) to tend to their injuries, perhaps for the rest of their lives — yet in the teeth of which, his plea in mitigation of sentence through counsel here and in the court below, showed a remarkable absence of any feeling of remorse for having caused this loss, pain and grieve multiplied seven fold; and (d) public interest demands that a deterrent and substantial custodial sentence with a long period of disqualification from holding or obtaining a driving licence be meted out to the defendant, so that a resounding message could be conveyed to others of his ilk.

A The current case has displayed an uncommon confluence of peculiar facts and circumstances, that would warrant this court imposing a stiff, deterrent and substantial custodial sentence to fit the offence. In the event, after considering such facts and circumstances and the aforesaid case-features, in conjunction with the defendant's plea in mitigation, I feel that the gravity of the offence in the present case would be sufficiently marked B by a sentence of three years' imprisonment with effect from the date he commenced serving the current sentence, and particulars of this conviction endorsed on the his driving licence; and it is so ordered. Further, in order to relieve the public of a potential danger for a very long time, I also order that the defendant be disqualified for a period of four years from holding C or obtaining a driving licence. And, save that the fine of RM7,000 (in default six months' imprisonment) imposed by the lower court is here confirmed, all its other orders that are inconsistent with the order now made are set aside. I believe that in all the circumstances of the case such sentence would best serve public interest.

D The punitive custodial sentence which I have just imposed may appear to be one of the heaviest on record. Nevertheless, it is not inconceivable that, due to the quirks of humankind, some may yet feel that the sentence of three years' imprisonment passed on the defendant would appear to be not punitive enough. Be it noted, that when exercising this court's discretion on sentence, I had also taken into account, that: (a) with his disqualification E from holding a licence for four years the defendant would lose his job as a lorry driver; (b) the defendant had an unblemished record, in terms of both criminal and traffic transgressions; and (c) he has a wife and three children of tender ages to support, as a sole breadwinner.

F *In postlude*

All said and done, it is my view that if this man in the dock before me has any modicum of wisdom or trace of perception in him, it would not be that difficult for him to decide to go in peace and serve his sentence with equanimity.

G In the present case, it is beyond question that the fatal accident was not caused by any mechanical failure or improper maintenance of the trailer-lorry. Nonetheless, as there is a prevalence of fatal accidents involving commercial vehicles and the general view is that a fair proportion of accidents are caused by such vehicles not being maintained in a fit and H serviceable condition, perhaps, s 20(2) of the Commercial Vehicles Licensing Board Act 1987 could in future be more readily invoked to prosecute and penalize the 'holder of the licence or any person ... permitting the use of a vehicle in respect of which a licence has been issued', who fails to comply with the conditions, inter alia: 'that the authorized vehicle is maintained in a fit and servicable condition as determined by the Director I General' (see s 20(1)(a) of the same Act).

Order accordingly.

Reported by Eugene Lee